# Central Law Journal.

ST. LOUIS, MO., APRIL 8, 1898.


Considerable mild criticism has been provoked by the recent decision of the Court of Appeals of Kentucky, in Pedigo v. Commonwealth, 44 S. W. Rep. 143. This was a criminal prosecution for arson, wherein it was held that testimony as to trailing by a bloodhound is admissible, where it is established by the testimony of some person, who has personal knowledge of the fact, that the dog in question has acuteness of scent and power of discrimination, and has been trained or tested in the tracking of human beings, and it appears that the dog so trained and tested was laid on the trail, whether visible or not, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him; but that it was error to admit such testimony where it did not appear that the dog had been trained or tested. The dissenting opinion of Guffey, J., shows very clearly the danger attending the admission of such testimony.

The interesting question recently came before the Supreme Court of Indiana, whether life insurance policies are taxable. State Board v. Holliday, 49 N. E. Rep. 14. The court in an elaborate opinion written by McCabe, J., hold that they are taxable. Two of the members of the court dissent from the conclusion. The majority of the court, while not denying that life insurance policies are personal property, say that the statute taxing personal property was not intended to include life policies, since it made no provision respecting the mode of valuation, or of assessment of such property. The legislature alone, they reason, having the power to select subjects for taxation, it follows that where this power is not exercised no other department of the State government can supply the omission. To say that a law taxing personalty covers all forms of personalty is fallacious, in the court's view, since the legislature not only selects subjects for taxation, but provides regulations or methods for a just valuation, and clothes some person with authority to assure such valuation. Where, therefore, no regulation has been provided as to any particular species of property, such species cannot be assessed. This conclusion, says the court, may rest either on the inference from such failure to prescribe such regulations that the legislature did not intend to select that particular species as a subject of taxation, or else, regardless of legislative intent, the failure to provide regulations leaves the property unselected, and consequently outside of the powers of the taxing board.

The dissenting judges point out that the legislature has laid special stress on the provision that "all property shall be assessed;" that there is a clause declaring that all property not expressly exempted shall be subject to taxation; that new forms of property are constantly presenting themselves, and as soon as a new species is observed or discovered it is the duty of the taxing officers to assess it. As for rules and regulations, the law expressly vests the board with power to make them.

A question of discrimination by railroad companies in the furnishing of transportation facilities, recently came before the Supreme Court of Arkansas, in Little Rock & F. S. Ry. Co. v. Oppenheimer, 43 S. W. Rep. 150. It was held that a failure on the part of a railroad company to furnish facilities for forwarding all cotton offered at points on its line where there was no competition, when it furnished sufficient transportation at competing points, in a year when the shipments of cotton were unexpectedly heavy, is not such a case of unjust discrimination as will subject the company to a penalty at the suit of a shipper, under Act March 24, 1887, providing in section 1, "All individuals, associations and corporations shall have equal rights to have persons and property transported over railroads in this State, and no unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the State," etc.; and in section 4, "No discrimination in charges or facilities for transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad, or any lessee, manager, or employee thereof shall make any preferences in furnishing cars or motive power," etc.; and in section 12, prescribing a penalty for violations, which may be recovered by civil action by the party aggrieved. Wood and Hughes, JJ., dissented from the conclusion of the court.

## NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE OF LANDLORD—LIABILITY FOR DANGEROUS PREMISES.—Barman v. Spencer, 49 N. E. Rep. 9, is a well considered case by the Supreme Court of Indiana, on the subject of the liability of landlord for injuries caused by dangerous premises. The holding of the court is, "that where a landlord is obligated, in a contract of renting, to repair a well, and has reserved the right to enter upon the premises for that purpose, and, while thus engaged, negligently leaves the well open and unguarded, he is liable for injuries resulting to an invited guest of his tenant, from his negligence in making the repairs; that a landlord who has not covenanted to repair is not liable for an injury caused by defective premises, while the tenant is in possession; that a landlord who has covenanted to repair may be liable for injuries caused by his failure to repair; that a host, although a tenant, is liable to his invited guest for injuries resulting from a defect in the premises, unknown to the guest, which is caused by the gross negligence of the host; that where the landlord, whether he has covenanted to repair or not, negligently creates a dangerous condition of the rented premises, while making repairs, he is liable to one lawfully on the premises, who, without contributory negligence, is injured by reason of the dangerous condition of the same; and that where a complaint in an action for damages caused by falling into an open well in the dark alleges that the injured party had no knowledge of the dangerous condition of the well, or means of knowing that the cover had been left off, and that, when she previously saw it, it was in a safe condition, and that the injury was caused by the negligence of the defendant, without negligence on behalf of the plaintiff, the complaint is sufficient to admit any evidence showing plaintiff's freedom from contributory fault and the care required to exempt one from the imputation of contributory negligence." The opinion of the court by McCabe is exhaustive of the principal authorities.

---

SCHOOLS—SUSPENSION OF CHILDREN FOR OFFENSE OF PARENT.—The case of Education v. Purse, 28 S. E. Rep. 896, decided by the Supreme Court of Georgia, has attracted wide attention and involves new questions pertaining to the rights of pupils in public schools. The holding is, "that a board of education having the charge and control of a system of free schools established by law, and supported by taxation, has the right to suspend from attendance school children whose parent, whether father or mother, in undertaking to call in question or interfere with the discipline of a teacher over one of these children, enters the schoolroom of such teacher during school hours, and, in the presence of the scholars there assembled, uses offensive or insulting language to such teacher, though none of the children so suspended had in fact been guilty of any violation of the rules of school. The fact was that the mother of certain children, in attendance upon a public school, went to the schoolroom during a session, and by outspoken criticism upon the methods therein employed, and offensive language, 'seriously interfered with the discipline of the school.' The controversy seems to have been very seriously prosecuted, and the supreme court takes the position that the board of education had the right to suspend the children because of their parent's act. The opinion of the court, per Cobb, J., reviews at great length the history of what may be called the law of education."

---

APPEAL—BILLS OF EXCEPTIONS—TIME OF MAKING—TERM TIME.—A question of practice arose in the case of Winter v. People, decided by the Supreme Court of Colorado, which will be of interest in many of the States having similar statutes as to the time within which bill of exceptions for an appeal must be signed and filed. The court held that under the Code respecting bills of exceptions providing that "it shall be the duty of the judge to allow the same, and to sign and seal the same, at any time during the term of the court at which exceptions were taken, or at any time thereafter to be fixed by the court," the trial judge was without authority to make an order extending the time within which a bill of exceptions could be tendered and filed, at chambers, and after the expiration of the term at which final judgment had been rendered and an appeal therefrom prayed and allowed. The court said, in part: "The office and purpose of a bill of exceptions are to preserve in, and make a part of, the record, such matters as transpired in the progress of the trial that otherwise would not become a part thereof. It is to bring into the record matters which are not parts of the record proper. Elliott, App. Proc. § 797; Hake v. Strubel, 121 Ill. 329, 12 N. E. Rep. 676. Ordinarily, the making of a bill of exceptions is spoken of as a judicial act, although there is apparently some conflict of authority on this point. The seeming conflict, however, is, in our opinion, more apparent than real. Properly speaking, the making of a bill of exceptions includes the settling, allowance, signing and sealing by the judge. It is a complex act, of which the settling and allowance are generally held to be judicial in their character, while the mere signing and sealing may be ministerial. Hake v. Strubel, *supra;* Elliott, App. Proc. § 798. In this State the act, perhaps, assumes more of a ministerial character than usual, from the fact that, in case of the refusal of a judge to sign, the bill may be preserved by the affidavits of attorneys or other parties present at the trial. However this may be, and whatever distinction may be attempted to be drawn as to the character of the various acts which together constitute the act of making a bill of exceptions, there is no dispute that in this State the act fixing the time beyond the term of court within which the bill may be filed is wholly judicial. The Colorado Code (sec-

tion 385) provides, in reference to bills of exceptions, that 'it shall be the duty of the judge to allow the same, and to sign and seal the same at any time during the term of the court at which such exceptions were taken, or at anytime thereafter to be fixed by the court.' It will be seen that it is the duty of the judge to allow, sign and seal the bill, but the power to fix the time beyond the term of the court when this may be done is vested expressly in the court. This order is, therefore, unquestionably, a judicial act. From this section is derived the only authority for the making of a bill of exceptions after the close of the term at which final judgment was rendered. Without its provisions, suitors would be compelled to tender their bills, and have them signed and sealed, during the term. Our supreme court has said, in Gruner v. Moore, 6 Colo. 530: 'As a general rule, all judicial business must be transacted in term, whether there is any express direction to that effect or not. Such judicial business as may be done by the judge out of court is exceptional, and must find its warrant in some express provision of the statute.' It would seem to necessarily follow, therefore, that an order fixing the time within which a bill of exceptions may be presented being a judicial act, an order extending this time would be, in effect, a new order, also a judicial act, and could not be made after term, unless allowed by statute. We know of no provision of the statutes or of the Code which will permit it. It clearly does not come within the terms of Code, § 408. That applies only to motions and orders in causes then pending in the court presided over by the judge who attempts to act. It has no application to the case at bar, which had proceeded to final judgment, and in which an appeal had been prayed and allowed. To have been effective, the order of extension must have been incorporated in the record as of proceedings had and done at the preceding term. It is manifest that under no principle of law could the judge have authority to do this—to make a record of proceedings which were never had, and of a cause at a term which had expired. Hake v. Strubel, *supra*, is directly in point, involving the same identical question, and based upon the same facts. The existence of the rule, and the reason for it, are so aptly expressed that we quote from the opinion: 'The question we are asked to determine has relation to the power of a circuit judge, out of term, to open and change the record of a court held by him, and also to the character of the act of a judge in approving, signing and sealing a bill of exceptions in vacation, and whether the allowing and signing of a bill at such time thereby make the matters contained therein part of the record. It seems to us, the question of power is not an open one, or the rule of practice doubtful. When the February term, 1886, of the St. Clair circuit court ended by final adjournment, the record was closed, and the presiding judge lost control over it. Up to that time the record had remained under his control, and might be changed by him according to his judicial will; but, when once the term of the court ended, the record of the court, as made in term time, became fixed and unalterable, except as it might be changed in the mode and manner known to the law. This principle is fundamental, requiring no citation of authority in its support; and any departure therefrom would inevitably entail consequences dangerous to the administration of justice, and injurious to all litigants. * * * The making of the order allowing appeal, and fixing the amount of the bond, and the time in which the bond and bill of exceptions in the cause shall be presented and filed, is a judicial act, which can only be performed by the judge in term time, and when sitting as a court. The making of the order is an exercise of the judicial power vested in the presiding judge, but the order, when made, is the order of the court. If, then, the original order of appeal, providing, *inter alia*, within what time the bill of exceptions in the cause might be presented and filed, was a judicial act, which could only be performed by the judge in term time, and when sitting as a court, as we have seen is the case, it follows that the act of changing such an order by entering another order, extending the time in which the bill of exceptions in the cause might be presented and filed fourteen days, would be of the same judicial character—an exercise of judicial power—and such an act could be performed by a judge only in term time.' The same principle is affirmed in Missouri and Indiana. Duvall v. Mastin, 28 Mo. App. 527; Rigler v. Rigler, 120 Ind. 431, 22 N. E. Rep. 776. We have been cited to some decisions in other States, as holding a contrary view. An examination of them shows that they were based upon statutes peculiar to those States. In Nebraska there was a statute giving to the judge who tried the cause power, in certain cases, to extend the time within which the bill could be filed. Greenwood v. Cobbey, 24 Neb. 651, 39 N. W. Rep. 833. The cases cited from California were criminal cases, and it seems that there was a special statute in reference to bills of exceptions in criminal causes, and that it was directory, merely. The supreme court of that State, in construing this statute, said: 'The phraseology is different from that of the practice act in reference to like provisions in civil cases, and the reason of the rule is likewise different.' People v. Woppner, 14 Cal. 438. Oregon has a statute similar to that of California, and it followed the decisions of that State. Che Gong v. Stearns, 16 Ore. 221, 17 Pac. Rep. 871.

"Counsel for defendant insist that the question raised by this motion is merely technical, that it does not go to the merits of the case, and therefore inasmuch as the trial judge signed and sealed the bill, this court will assume that it was signed in time. We fail to see how we can do this, when the record itself shows that it was not signed in time. Nothing can be treated by this court as merely technical, and therefore subject to be disregarded at will, which is prescribed by statute as

the mode for exercising this court's appellate jurisdiction. Elliott, App. Proc. § 128; U. S. v. Curry, 6 How. 113."

---

JUDGES—LIABILITY FOR JUDICIAL ACTS.—In Blincoe v. Head, 44 S. W. Rep. 374, decided by the Court of Appeals of Kentucky, it was held that a police judge, whose court is one of special and limited jurisdiction, acts without jurisdiction in issuing an attachment without the affidavit or bond required by the statute, and is liable to the defendant therefor, especially where he is both judge and clerk, and therefore acts also as a ministerial officer. The court said in part: "In the case at bar, not only was the court one of inferior and limited jurisdiction, but it was exercising an extraordinary power, under a special statute prescribing the occasion and mode of its exercise. Nothing in favor of jurisdiction is to be presumed, and a strict conformity with the statute granting the power must be shown; and, as the defendant was not before the court, the writ, and all the proceedings under it, are *coram non judice* and void. The same author says upon this subject (page 73): 'And no court exercising a special and limited power can so determine its right to take jurisdiction through that power, in a given case, as to preclude one not a party to the proceedings from questioning that right in a collateral inquiry; for, as the validity and conclusiveness of the decision on that point must depend on the authority of the court to make it, the decision cannot be conclusive evidence of that authority. This would be saying that the court had jurisdiction to decide, because it had decided that it had jurisdiction.' And in Cooley, Torts, pp. 416, 417, recently quoted with approval in Glazar v. Hubbard (Ky.), 42 S. W. Rep. 1114, it is said: 'A judge is not such at all times, and for all purposes. When he acts he must be clothed with jurisdiction; and, acting without this, he is but the individual falsely assuming an authority he does not possess. The officer is judge in cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his cognizance, or cases between persons who are not, either actually or constructively, before him for the purpose. Neither is he exercising the judicial function when, being empowered to enter one judgment, or make one order, he enters or makes one wholly different in nature. When he does this he steps over the boundary of his judicial authority, and is as much out of the protection of the law, in respect to the particular act, as if he held no office at all. This is a general rule. * * * Most of the officers who exercise an inferior authority have no jurisdiction at all until certain preliminary action has been taken, which is particularly pointed out by statute; and neither in their case, nor in the case of the inferior courts, will any intendment of law be made in favor of jurisdiction when their action is called in question, but they must show by their written records that the circumstances existed which authorized them to act.'

"But in the case at bar the police judge was both a judicial and a ministerial officer. Having practically the same jurisdiction as a justice of the peace, he was both judge and clerk; and in the issuance of the order of attachment, whereby Blincoe was prevented from collecting the wages due him, he was acting as clerk—a ministerial officer. And the record discloses that he undertook, in direct violation of the statute, to exercise a special and limited power, without the preliminary acts being performed which alone could give him authority to act. If the clerk of the circuit court were to issue an attachment under such circumstances, without any affidavit being made or bond executed, can it be doubted that he would be liable for the injury which might result therefrom to the defendant in the attachment? In Connelly v. Woods, 31 Kan. 359, 2 Pac. Rep. 773, the court held that the justice had the right to rely upon the truthfulness of the affidavit, and was not bound to know at his peril that the affidavit was true, and that the justice had jurisdiction to issue the order. 'But this jurisdiction, we think, was merely the jurisdiction of a ministerial officer, and not that of a judicial officer. * * * ' Speaking of ministerial officer who exercise a *quasi*-judicial function as assessors, Judge Cooley says: 'But where an officer is to proceed upon evidence in writing, and the statute points out what this evidence shall be, it intends that it shall be found of record in the proper office, and not that important public matters shall be left to uncertain parol testimony.' Even assuming that Head was acting judicially, and not ministerially, in issuing the order of attachment, 'it is universally conceded that, when inferior courts or judicial officers act without jurisdiction, the law can give them no protection whatever.' Cooley, Torts, p. 419."

---

WILL—BEQUEST FOR CELEBRATION OF MASSES—SUPERSTITIOUS USES.—The Supreme Court of Kansas decides, in Harrison v. Brophy, 51 Pac. Rep. 883, that a bequest of a sum of money made in the will of a member of the Roman Catholic church to a priest of such church, for the celebration of mass for the souls of the testator and another, will be construed as a gift direct to the donee, with an injunction to the performance of the ceremonial named, and not as made to him in trust for such purpose, and therefore void, because incapable of enforcement by beneficiaries in being, and that the English common law which avoided bequests of the kind above stated, as being for superstitious uses, never became a part of the law of this country; and the validity of the gift for the purpose named is therefore upheld. The court says in part: "The will does not undertake to create a trust. The gift is absolute to the person named. The language in which it is made is advisory, persuasive, expressive of desire, 'precatory,' as called in the law of wills, but the passing of the gift is not conditioned upon the

performance of the act enjoined. Upon the conscience of the donee alone is laid the duty of performing the sacred service named. The testatrix might have made the gift in the usual terms. That she coupled with it an injunction to the performance of a solemn religious ceremonial cannot avoid it. The case of Holland v. Alcock, 108 N. Y. 312, 16 N. E. Rep. 305, is not in point against this view. The bequest in that case was made to trustees *eo nomine*. It was not made direct as in this case. There can be, of course, no trustee without a beneficiary in being; and, inasmuch as in the case named there was no beneficiary, there could be no trustee, and consequently no trust. Moreover, the case of Holland v. Alcock recognized the distinction we draw. The court in its opinion says: 'If the bequest had been of a sum of money to an incorporated Roman Catholic church or churches, duly designated by the testator, and authorized by law to receive such bequests for the purpose of solemnization of masses, a different question would arise. But such is not the case.' Since the decision of that case, the subordinate courts of New York have upheld bequests of the character of the one in question. *In re* Howard's Estate (Surr.), 25 N. Y. Supp. 1111; Vanderveer v. McKane (Sup.), 11 N. Y. Supp. 808.

"The fact that the legacy was a gift direct, and was not bequeathed in trust, obviates the necessity of noticing the objection made by counsel for plaintiff in error that it is void for uncertainty as to the beneficiaries. Neither is it void because repugnant to the law against bequests for 'superstitious uses.' To properly interpret the part of the will in question, and to determine whether effect can be given to it, we must bear in mind the Catholic church doctrine of purgatory. Purgatory is defined by an authoritative expositor of the church's creed to be 'a state of suffering after this life, in which those souls are for a time detained who depart this life, after their deadly sins have been remitted as to the stain and guilt, and as to the everlasting pain that was due to them, but who have, on account of those sins, still some debt of temporal punishment to pay; as also those souls which leave this world guilty only of venial sins. In purgatory these souls are purified and rendered fit to enter into heaven, where nothing defiled enters.' Catholic belief (Lambert's Am. Ed.), 196. Devotees of this church also believe 'that souls in purgatory are relieved by the sacrifice of the mass, by prayer, and pious works and alms deeds.' *Id.* 202. Scriptural authority, as it is recognized by Catholics, though by others regarded as apocryphal, exists for the practice of offering prayers for the dead, and for contributions to the church to enable it to perform its offices in their behalf. 'And, making a gathering, he (Judas Maccabeus) sent 12,000 drachms of silver to Jerusalem for sacrifice, to be offered for the sins of the dead. (For, if he had not hoped that they that were slain should arise again, it would have seemed superfluous and vain to pray for the dead.) And because he considered that they who had fallen asleep with Godliness had great grace laid up for them. It is therefore a holy and wholesome thought to pray for the dead, that they may be loosed from sin.' 2 Maccabees, xii., 43-46. In the light of these beliefs, the act of Mary Brophy in making the bequest is reasonable and consistent, and should be upheld unless it be prohibited by force of some positive rule of law. In the reigns of Henry VIII. and Edward VI., statutes were enacted to prevent the devoting of property to what was termed 'superstitious uses.' This was anterior to the reign of James I., during which the common law, consisting of the statutes and legal customs and usages then in force, was imported into the colonies; and therefore, unless these statutes have been abrogated or modified by constitutional or statutory law, judicial decisions, and the condition and wants of the people, they are of binding force in this State. Gen. St. 1897, ch. 1, § 4. If, by proper construction, the statutes of Henry and Edward prohibit the making of bequests for the purposes named in the will under consideration, assuming them to be parts of our law, the gift in question must fail. It is said, however, that the English courts did not hold the making of such gifts to be repugnant to the terms of these statutes, but declared them void by analogy to the prohibitions of the statutes, and by the general policy of the common law. 1 Jarm. Wills (6th Ed.), 197, 198. Be that as it may,—and, for the purpose of the question before us, it can make no difference whether the prohibition was originally statutory or otherwise,—we have no hesitation in declaring the English common-law interdiction of bequests of the kind named to be without force in this State. It is opposed to the spirit of religious toleration which has always prevailed in this country, and which has found expression in the federal constitution and statutes, and in the constitution and statutes of every State of the Union. That religious intolerance which infused itself through parliamentary enactments and judicial sentences, and which procured the law to anathematize different creeds as 'superstition' or 'heresy,' according as Catholic or Protestant gained governmental ascendancy, was, more than anything else, what our ancestors fled from. It would be strange, indeed, had they carried to this country, and established here, the very laws of religious persecution from which they sought to escape. They brought here such of the common law as was adapted to the condition and wants of the people, and as was consistent with the spirit and genius of free political and religious institutions."

## HAS A CHECK HOLDER A RIGHT OF ACTION AGAINST A BANK FOR REFUSAL TO PAY SAME.

Has a check holder a right of action against a bank for refusal to pay the same, and does such check operate as an assignment of the funds *pro tanto?* In the commercial world, in the transaction of its business, the existing right of debtor and creditor, the establishment of those rights, the laying down of just rules by our courts, has given rise to many complicated questions, and an abundance of litigation. The mad chase of creditors, to gain supremacy and preference, has been a fruitful field of utility for the practitioner. Take this day of extensive credit, the existing rights and constant endeavor of the creditor to obtain his foremost place, has given rise to much adjudication on the part of courts. To-day, when we are transacting so large a part of our business by the means of banks and banking corporations, it naturally has given rise to much litigation. The rights of the bank, its relation to its depositors, to third parties and to similar institutions, of the depositor and third parties toward the bank, are constantly arising. Upon what footing and in what relation the depositor of a bank should be held, so far as the bank was concerned, was early decided by our courts, where it has been held that the relation arising by the deposit of money in a bank, if it be a general one, is that of a debtor and creditor.[1] Thus the relation having been established as that of debtor and creditor, the nature of the contract must be taken into consideration and the obligations arising thereunder. The general rule of law is that when deposits are made with the bank, unless they are special deposits, they belong to the bank as a part of its general funds.[2] And a general depositor has no claim upon the money so deposited, but his claim is upon the bank for a like amount of money.[3] That is, every deposit made in the bank is a loan to the bank and cannot be recovered, but the depositor's remedy is a personal action against the bank for money had and received. This is the rule laid down by Morse in his work on Banks and Banking.[4] Mr. Morse also adds, "And every payment by the bank, to or on account of such customer, is a repayment of the loan, *pro tanto*. But even though the bank is a debtor to the depositor it stands in a relation different from what the world understands a debtor to be. It must, from the very position in which it stands, belong to a class of debtors distinctly different from what the words commonly mean. A bank gives the community to understand that those who have funds in its hands have not only the right to draw upon the deposit, but that all drafts will be paid, and is for all practical purposes a parol promise to pay all checks, that the owner of the deposit may draw, or, I would add, the payment of all of such claims or any part thereof as the creditor may present for payment at any time during which the bank holds its doors open to the public for business, and there is a fund to meet the checks presented. The first question that would naturally arise under such an offer held out by the bank is, Is a bank compelled to honor and pay in small portions the checks of such depositor? The court of Illinois has laid down this rule: A depositor may draw checks upon his bank at pleasure, for the whole or any part of moneys to his credit in the bank, and each holder of a check may recover the amount expressed in it, and extend it to cover an action by the depositor himself. That is, so long as the relation of debtor and creditor exists it is the depositor's inherent right to draw such checks at it may be necessary for him, and so split the debt as to suit his purposes. The bank may cease the existing relation by refusing to accept more deposits from such depositor, and offer him the whole amount due, when his right to draw out in parcels would be terminated, unless in favor of *bona fide* holder of his check.[5] It is upon this question that the courts of both this country and England are not uniform. To the question as to whether a check drawn upon a bank operates as an assignment *pro tanto* of the depositor's fund we find two, and, in fact, three lines of authorities. Taking up the first line, which holds that such drawing

[1] Fletcher v. Sharpe, 26 Am. L. Reg. 71; Bank of Republic v. Millard, 10 Wall. 152; Lund v. The Bank of North America, 49 Barb. 221.

[2] Fletcher v. Sharpe, 23 Am. L. Reg. 71; Bank of Republic v. Milliard, 10 Wall. 152.

[3] McLean v. Wallace, 103 Ind. 562.

[4] Morse on Banks & Banking, sec. 289.

[5] Chicago, Marine & Fire Insurance Co. v. Slangford, 28 Ill. 168; Bank of Antigo v. Union Trust Company, 149 Ill. 352.

of the check does not operate as an assignment of such fund, we find that they have taken one or more cases as their foundation and followed them, regardless of the exact fact involved, and also the laying down of principles somewhat broader than the case required and followed by the other courts, have been construed to cover their case, when upon closer observation it will be found that the same question is not involved. The courts of Massachusetts have laid down the rule that the promise to the drawer by the drawee of a negotiable draft or bill of exchange, to accept and pay the same, does not make the drawee liable to an action by a holder, unless he has taken the draft on the faith of such promise, is a mere chose in action, upon which he only to whom it was made can sue. Bankers agree with their customer to receive his deposits, to account with him for them, to repay them to him on demand, and to honor his checks to the amount for which they are accountable to him, when the checks are presented; and for any breach of that agreement they are liable to an action by him. But the money when so deposited is the absolute property of the bankers, impressed with no trust, and which they may dispose of at their pleasure, subject only to their personal obligation to the depositor to pay an equivalent sum upon his demand or order. The right of the bankers to use the money for their own benefit is the very consideration for their promise to the depositor. They make no agreement with the holders of his checks.

A check drawn by him in common form, not designating any special fund out of which it is to be paid, nor corresponding to the whole amount due to him from the bankers at the time, is a mere contract between the drawer and payee on which, if payable to bearer, and not paid by the drawees, any holder might doubtless sue the drawer, but which passes no title, legal or equitable, to the payee or holder in moneys previously paid to the bankers by the drawer; and the banker's promise to the drawer to honor his checks does not render them, while still liable to account with him for the amount of any check as a part of his general balance, liable to an action of contract by the holder also, unless they have made a direct promise to the latter by accepting the check when so presented or otherwise.[6] The Supreme Court of the United States says, in relation to the contract existing between the parties, it is purely a legal one, and has nothing of the nature of a trust in it. And it is very clear that the holder of a check can sue the drawer if payment is refused, but can he also sue the bank? It is conceded that the depositor can bring *assumpsit* for the breach of contract to honor his check, and if the holder has a similar right, the anomaly is presented of a right of action upon one promise for the same thing, existing in two distinct persons at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes him no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and the holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until after the check is presented and accepted?[7] The New York court considers the right of the depositor as a chose in action, and his check does not transfer the debt or give a lien upon it to a third person without assent of the depositary. Here the court says a check is a bill of exchange payable on demand, and then argues that it does not operate as an assignment of the funds.[8] The holder of an ordinary check, unaccepted and uncertified, cannot compel payment from the bank upon which it is drawn, even if the account of the

[6] Carr v. National Security Bank, 107 Mass. 45.
[7] National Bank v. Millard, 10 Wall. 152.
[8] Chapman v. White, 6 N. Y. 417.

drawer is sufficient to meet it when presented. Under such circumstances, the right of action belongs to the drawer or creditor of the bank, and not to the holder, who is merely a stranger.[9] The check being considered an order, which may be countermanded and payment forbidden by the drawer before it is actually cashed,[10] and knowledge of the bank of the drawing of such check is not sufficient to bind it,[11] although a check in the hands of a third party does affect the legal transfer of the debt, if it was the intention to transfer such debt, the court should carry out that intent.[12] The English courts are as divided as the American upon this rule, the court holding a check a bill of exchange,[13] and, being a check, is not an assignment of money in the hands of a banker, but is a bill of exchange, payable at a banker's,[14] thus making bank checks fall within the definition of bills of exchange, and making it difficult to indicate with precision their differential features.[15] There being no privity, expressed or implied, the holder of the check, in its original form, can bring no suit on the check against the drawee, even if it be conceded that he may maintain an action for any special injury by reason of the omission of the drawee to perform a legal duty.[16] Judge Jollario, after reviewing decisions on both sides, thinks that the weight of authority takes the stand that a check does not operate as an assignment of the funds.[17] In that class of cases holding that a check operates as an assignment *pro tanto*, Illinois takes the lead.[18] The court of this State has laid down this rule: "It is, by universal consent of the commercial world, the contract between depositors and banker, that the bank, when it receives the deposit, shall pay it out on the presentation of the depositor's checks, in such sums as those checks may call for, and the person presenting them, and it agrees with the whole world that whoever shall become the owner of such check shall, upon its presentation, thereby become the owner, and entitled to receive the amount specified in such check, provided the drawer shall at that time have that amount on deposit.[19] The check of a depositor upon his bank, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may again be transferred by delivery, and when presented at the bank the banker becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount on deposit, subject to his check at the time it is presented, it operates as an equitable assignment, if not a legal, and transfers the money from the depositor to holder of the check.[20] Such check carries with it the title to the amount named in the check to each successive holder, and the drawer, after a check has passed into the hands of a *bona fide* holder, it is not in his power to countermand the order of payment.[21] The courts holding this doctrine say, in speaking of the want of privity, that, although at one time there was some conflict of opinion, it is now laid down by the text-writers to be settled that, in cases of simple contract, if one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it, though the consideration did not move from him. And if it be true, as it doubtless is, that the banker is liable to the depositor for the damages resulting to him by reason of the failure to pay his checks, this liability ought not, upon principle, to exempt him from performance of his promise or undertaking to pay the check; the holder may enforce the promise, while the depositor recovers nominal or special damages for the breach of it.[22]

Upon the refusal to pay the check *assumpsit* will lie on the implied promise which the law raises in his behalf, commercial good, if not commercial necessity, seems to demand that checks be regarded as they are in practice intended to be, as transfers of the fund assigned, and not as mere powers to receive

[9] O'Connor v. Clark, 124 N. Y. 332; First National Bank v. Clark, 134 N. Y. 368.

[10] Florence Mining Company v. Brown, 124 U. S. 385-391.

[11] Lund v. Bank of North America, 49 Barb. 221; Atty. General v. Insurance Company, 71 N. Y. 325.

[12] Throop Grain Company v. Smith, 110 N. Y. 83.

[13] Lamb v. Sutherland, 37 U. C. Q. B. 149.

[14] Hopkins v. Forester, L. R. 19 Eq. 74.

[15] Planters' Bank v. Merritt, 7 Hersk. 177.

[16] National Bank v. Miller, 77 Ala. 168; Bank of Republic v. Millard, 10 Wall. 152.

[17] Harrison v. Wright, 100 Ind. 518.

[18] Munn v. Buch, 25 Ill. 21; Chicago Fire & Marine Insurance Co. v. Slangford, 28 Ill. 168.

[19] Brickford v. First National Bank, 42 Ill. 238.

[20] Brickford v. First National Bank, 42 Ill. 238; Fourth National Bank v. City Bank, 68 Ill. 398.

[21] Union National Bank v. Oceana Bank, 80 Ill. 213.

[22] Roberts v. Austin, Corbin & Co., 26 Iowa, 325; May v. Jones, 87 Iowa, 198.

the money. Whenever a contract is essentially of a circulating nature, going about, as it were through society, to draw forth the exertions of the property of its members, as it may encounter them here and there on the commercial arena, it carries its own consideration and its own obligations with it, and forms a privity with the person to whom it comes.[23] The objection of a check holder suing a bank on the ground that there is no privity between him and the bank, seems to us utterly untenable. It is true that there is no privity before presentment of the check, but by that very act they are brought into privity and the check holder's right to sue the bank is completed.[24] There is certainly no good ground for holding that a check drawn upon a fund in a bank is not an equitable assignment as between the drawer and payee; and in a case where there is controversy as to the rights of the bank or drawee, it does not lie in the mouth of the drawer or his assignee to say that such an instrument is not an equitable assignment.[25] Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of a check created by the implied promise held out to the world by the banker on the one side, and the receiving of the check for value and presenting it, on the other. It is a familiar principle of daily illustration, that a promise made to the public, that the performance of a particular act shall entitle the person performing the act to particular right, is a valid *assumpsit* to such person. The promise on the one hand and the performance on the other, create a privity between the parties as intimate and as obligatory as if the promise had originally been made to the particular person.[26] Shown, as it has been, that the relation of bank and depositor is that of debtor and creditor, without any element of trust entering therein, that the right of the creditor is a mere chose in action, does it follow that the creditor's relation in regard to the drawing of checks is to be restricted to the mere discretion of the bank? It has become established by long custom, that when a bank holds itself out to the world for business that it must follow the *dicta* placed there by that custom. That does not mean that the bank cannot protect itself against loss by the reason of fraud on the part of depositors. Another statement advanced is that the depositary has the right to insist upon a single payment of the deposit. But when? Only when it is desirous of closing its account with the depositor, and not even then when there are outstanding checks to be paid; it is one of the laws of the great banking system, and so interwoven with its business as to have become its vital part, that the depositor has the inherent right to so split his account as to meet his just demands. Take that power away and your banks must go out of business; it is part of the contract held out to the world; it is one of the fundamental principles of the law merchant. It has been the source of much contention, that there is no privity of contract between holder and the drawee. It seems that it ought to be very clear from the very usage of the business, that there is a privity implied between the banker, and whosoever the depositor should designate to receive it, the bank agreeing to pay whomsoever the depositor may designate. It has now been settled that where one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it though the consideration did not move from him, and taking into consideration the fact that presentment having been made that act alone should be sufficient to bring them into privity. The fact that if the holder of a check can maintain an action against the drawee, there would be a right of action upon one promise for the same thing in two persons at the same time, the payee and drawer, is answered and discussed in one of the cases, upholding the theory of a check operating as an assignment.[27] Another fact advanced by the first class of cases is, if a check works an assignment as against the drawee, he would be compelled to pay, although the deposit might be exhausted by subsequent checks. Checks do not have priority according to the time when they are drawn; that being the case, it would be impossible for banks to carry on their business; but when they are presented, then, if they are refused payment and subsequent checks are paid, the case would be changed. This is also followed by the proposi-

[23] Frogarties v. State Bank, 12 Richardson, 518; McGregor v. Loomis, 1 Disney, 251.

[24] Daniels on Negotiable Instruments, § 1638—§ 1643.

[25] Pease v. Landauer, 63 Wis. 20; German Savings Institution v. Adea, 8 Fed. Rep. 106.

[26] Munn v. Bineh, 25 Ill. 21.

[27] Roberts v. Austin, Corbin & Co., 26 Iowa, 325.

tion that a check may be countermanded at any time before acceptance or payment, and this could not be so if they operated as an equitable assignment, but it would seem that the growing doctrine is not to permit of the countermanding of checks. The tendency of our courts at present is to look upon the question in a different light, with a country depending and transacting its business by paper in the shape of checks, that these checks should be so strengthened and the payment guaranteed, and this will be aided and helped along when the country has the assurance that bank checks do operate as an assignment *pro tanto*. Says Mr. Morse, in summing up the law upon this question: "What must we think of a system of law that claims as one of its fundamental maxims, 'Whenever there is a right there is a remedy,' and proclaims that for every injury the law will give redress, and yet denies the right of the check holder to sue the drawee?"[28] It at last resolves itself down to the question, what construction of a check consistent with the usages of business is best calculated to advance justice and secure good faith and the convenient dispatch of business? It would seem that this difficulty could be easily overcome, and the light thrown upon this question by recent adjudication solve it when it is established once and forever that the bank has, by its position toward the public, closed the gap of privity of contract, and that the privity is established, as a matter of law, between the parties; that the drawing of such check operates as an assignment *pro tanto*, and that a refusal on the part of the bank to pay the check gives the holder the right of action.

Madison, Wis. CHARLES H. TENNEY.

[28] Morse on Banks and Banking, sec. 500.

---

WILLS—CONSTRUCTION—POWER TO MORTGAGE ESTATE—REFORMATION OF MORTGAGE.

LARDNER v. WILLIAMS.

*Supreme Court of Wisconsin, March 1, 1898.*

1. A power in a will authorizing the wife to sell and dispose of the estate as she may deem best to support herself and family, and carry on testator's business, gives the wife power to mortgage the estate for such purposes.

2. Rev. St. § 2149, providing that instruments, executed by the grantee of a power, conveying an estate or creating a charge, which is only authorized by the power, shall be deemed a valid execution of the power, although it is not referred to in the instrument, does not apply where such grantee possesses an interest as well as a power.

3. A mortgage made by a widow who has a life interest as well as a power to mortgage the property, which contains no reference to the power, only conveys her life estate.

4. A court of equity will reform and enforce a mortgage which was intended to convey the fee, but, by mistake or ignorance, only conveyed the life estate.

5. A judgment ordering a foreclosure, as though the mortgage was reformed, is equivalent to a judgment of reformation.

WINSLOW, J.: This is an action to reform and foreclose two certain mortgages upon the same parcel of real estate. The mortgages amount to $2,000, were executed by the defendant Lucina H. Williams to H. K. and B. G. Edgerton, assignors of the plaintiff, and were in the usual form, purporting to mortgage the fee of the premises, and were signed simply Lucina H. Williams. The mortgaged premises were originally the property of one William P. Williams, the husband of Lucina, who died in March, 1881, testate, and the plaintiff claims that the mortgages should be reformed so as to show that they were executed by Lucina under a certain power given her in the will of said William P. Williams. The defendants deny that they were executed under said power, and claim that only the life estate was covered by said mortgages for the life of said Lucina. The court found, after trial of the action, that William P. Williams died leaving surviving his widow and 11 children, the oldest being about 25 years old, and the youngest 4 years old, at the time of the father's death; that he then owned the real estate mortgaged, and left a last will, which was duly probated, and which contained the following clause: "Secondly. I hereby give, devise and bequeath unto my wife, Lucina H. Williams, all the rest and residue of my estate (after the payment of my debts, as aforesaid), to be used and held by her for her own support, and for the bringing up and educating and support of all my minor children until they shall severally become of age (twenty-one years), and until my said wife shall depart this life, unless she shall sooner marry; and at her death the balance of my said estate shall be divided among all my children, equally shared and share alike; and, in case of her marriage, then, and in that event, such division of my said estate shall be then made as aforesaid; but in no event shall any such division of my said estate be made until all my said children shall have arrived at the age of twenty-one years. It is hereby expressly intended by me in this will that my said wife shall have the full right and power to hold my said property and my business and carry on the same, in the same manner and in accordance with her own judgment and discretion, as I could and would do were I living and present in and about the same. Further, that she shall also have the right to sell and dispose

of all and singular of any and all of my said estate, both real and personal, in manner and as she may in her own judgment deem best for supporting herself and family, aforesaid, and carrying on and management of said business, or any other proper business, for said purposes, during the time she may hold and use the same, and my said wife shall have and hold all my said estate and dispose of any part thereof for the aforesaid use and purposes, and shall have full and complete power and authority to sell and convey the whole or any part thereof." The court further found that the real estate in question was the homestead of the deceased, and continued to be the home of Lucina and the minor children after the death of said Williams; that Lucina and the minor children had no other property except the property left by the deceased, and that the income therefrom was small, and insufficient for the support of the family and the education of the children, so that it became necessary for Lucina to raise money out of the real estate left by the husband for the support of herself and the support and education of the children, and that she was obliged to dispose of nearly all the estate, except the land described in the mortgage, for such purposes; that, before the execution of the mortgages in question, she raised the money necessary for her support, and the support and education of the children, by mortgaging the land in question, and that said mortgages were released and became merged in the mortgages described in the complaint; that, at the time of the execution of the mortgages described in the complaint, she had been trying to sell said premises to raise money necessary for her support and that of the family, and had been unable to sell the same except at a sacrifice, and that she thereupon executed the mortgages in question for the purpose of raising the money necessary for her support and the support and education of the minor children, and that the consideration of said mortgages was paid to her for such necessary support and education, and so used by her; and, further, that said mortgages were executed and delivered with the intent by all parties to mortgage and convey the fee in said lands as well as the life estate of said Lucina under the power given in said will, and that the value of said real estate did not exceed $3,500. It was further found that said Lucina has remained unmarried since the death of her husband, and that all the allegations of the complaint were true, and that said mortgages were effectual to mortgage the fee of said premises, and that the plaintiff was entitled to the relief demanded in the complaint. Upon these findings, judgment of foreclosure and sale was rendered adjudging sale of the fee of the premises as against the defendant Lucina and the remaining defendants, consisting of the children of said William P. Williams. From that part of the judgment adjudging that the fee of the premises be sold instead of the life estate of Lucina, the defendants appeal.

The findings of fact were fully proven by clear and satisfactory evidence, and it is not deemed necessary or profitable to review the evidence to demonstrate that it supports the findings. The questions remaining for consideration are purely legal, and are two in number, viz.: (1) Did the power given in the will to the widow, Lucina, authorize her to mortgage the premises? and (2) if the power to mortgage was granted by the will, then was such power exercised by the execution of mortgages which contained no reference to the power? and, if it was not, could such mortgages be reformed and made effective as valid mortgages upon the fee under the power?

1. The widow was left with a very small amount of property and with a very large family to support. It clearly appears by the will that the testator intended that his widow should have a life estate during widowhood in all the property, and that she should also be clothed with power to use and dispose of all the property left in carrying on a small mercantile business and supporting herself and educating the children, as fully as the testator could do if living. This was really necessary, under the circumstances, and in fact was the only reasonable provision which could be made for her, in default of giving her an absolute fee. The question is, what is the proper construction to be given to the provisions of the will, construing it all together, and giving effect to the manifest intent of the testator as shown by the will, in the light of the surrounding circumstances. Hopkins v. Holt, 9 Wis. 228; Eastman's Estate, 24 Wis. 556; Lovass v. Olson, 92 Wis. 616, 67 N. W. Rep. 605. Applying this test to the will in the present case, we can entertain no doubt that the intent of the testator was to give his widow power to mortgage the property as well as to sell and convey it. Otherwise she might not be able to educate and support the children, and would not have that full right and power "to hold the property and business" and carry on the same in the same manner as the testator could do if living, and the clear intent of the testator would be defeated. Kent v. Morrison, 153 Mass. 137, 26 N. E. Rep. 427. In so holding, we are not to be understood as holding that a simple power of sale will authorize a mortgage. This is a question upon which the decisions are not uniform. See Perry, Trusts (4th Ed.), § 768; 18 Am. & Eng. Enc. Law, tit. "Powers," p. 940, note 2. We simply construe the language of this will as giving the power to mortgage.

2. The power being established, we proceed to the second question, which naturally divides itself into two questions, namely,—were the mortgages on their face a valid execution of the power? and, if not, was a case made for their reformation, so as to be valid under the power?

The widow had a life estate during widowhood, and a power of sale over the same land. The well-established rule at common law is that, where a person has both an interest and a power, a conveyance which contains no apt words indicating an intent to exercise the power will be held

to be merely a conveyance of the interest, and not an execution of the power. 4 Kent. Comm. 334, 335; Sugd. Powers, ch. 6, § 8; Insurance Co. v. Shipman, 119 N. Y. 324, 24 N. E. Rep. 177. This rule was recognized and adopted in this State in case of a quitclaim deed made by a life tenant who had a power to convey the fee. Towle v. Ewing, 23 Wis. 336. It might seem that this rule was changed by section 2149, Rev. St., which is the same as section 51, ch. 85, Rev. St. 1858, and reads as follows: "Every instrument executed by the grantee of a power conveying an estate or creating a charge, which such grantee is authorized by the power to convey or create, but which he would have no right to convey or create unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein." The same statutory provision, in substance, exists in New York, and the court of appeals of that State, in passing upon it in a case almost identical with the one at bar, held that the statute was intended "to provide that, whenever a single power exists under which a grantor may convey or mortgage real estate, his conveyance is attributable to the exercise of the power," but that it was not intended thereby to change the long-existing rule that, if a grantor possessed an interest as well as a power, his mere conveyance, without reference to the power, would be held to apply only to his interest. Insurance Co. v. Shipman, *supra*. Such, also, is the apparent effect of the decision of this court in the case of Towle v. Ewing, *supra*, although the statute was not referred to in that case. We are content to adopt this construction, and therefore hold that the mortgages, upon their face containing no reference to the power, only cover the life estate of Lucina H. Williams.

This conclusion, however, does not preclude the possibility of reformation of the instruments as between the parties, if a proper case for reformation be made. Such an instrument is fully as susceptible to reformation as any other conveyance, where no rights of third persons have intervened. If the understanding was that the mortgages should be executed under the power granted by the will, and should cover the fee, and by mistake or ignorance of the scrivener they were not made in the proper form to carry out the agreement, then a court of equity has power to reform and enforce them as contemplated and agreed by the parties. Such errors as these are very frequently corrected by a court of equity, and there have been marked examples of the exercise of this beneficent power by this court. Canal Co. v. Hewitt, 62 Wis. 316, 21 N. W. Rep. 216, and 22 N. W. Rep. 588; Silbar v. Ryder, 63 Wis. 106, 23 N. W. Rep. 106; Whitmore v. Hay, 85 Wis. 240, 55 N. W. Rep. 708; 2 Pom. Eq. Jur. § 845. In the present case it was conclusively shown, not only by the circumstances, but by direct evidence, that both mortgagor and mortgagees intended and agreed that the fee of the land should be mortgaged, and not the mere life estate, and that they knew that the power to mortgage came from the provisions of the will, and that they supposed that a mortgage in usual form would be sufficient to make a valid mortgage on the fee under the will. No lawyer was consulted, but one of the mortgagees drew the papers, and did not suppose it necessary to recite the power, but thought an ordinary mortgage would be sufficient. If a court of equity could not relieve the mortgagee under such circumstances, and make the agreement what it was intended to be, it would be a reproach to the law. The court found that the intent of the parties was to execute the power and mortgage the fee, and that by mistake the papers were drawn without reference to the power, and that the plaintiff was entitled to the relief prayed in his complaint, a part of which consisted in the reformation of the mortgages. We do not find that the judgment contains any provision specifically reforming the mortgages, but it adjudges foreclosure and sale of the fee in all respects as though the mortgages were reformed, and we regard this judgment, under the findings, as amounting substantially to a judgment of reformation. Judgment affirmed.

NOTE.—*Recent Cases on Testamentary Powers of Disposition of Property.*—A clause in a will authorizing the executors to "sell all property that may be on hand at testator's decease," and "not disposed of by this will," does not empower them to sell land devised to testator's daughter during life, and on her death "to be sold, and the proceeds divided equally among testator's then living children." Epley v. Epley, 16 S. E. Rep. 321, 111 N. Car. 505. A will giving testator's wife "the interest that may accrue" on designated bank stock "after my death, as long as she lives, to do as she may please with," and which appoints the wife executrix, and provides that, "if necessary to change the bank stock, or any or either, from any cause now unforseen that may arise, she is authorized to do so," vests the wife with discretionary power to sell the stock; and such discretion is not abused by a sale of stock on which the bank had failed to pay dividends for several years. Trimble's Executrix v. Lebus (Ky.), 22 S. W. Rep. 329. Where a testatrix devises lands to her executors for the purpose of carrying out the directions of her will, and directs that it be distributed equally among her children, the executors have power to sell lands not capable of division in kind. Mimms v. Delk (S. Car.), 20 S. E. Rep. 91. Where testator devised to his wife for life a farm, stock and other personalty, without any restriction save that his son was to have the necessary expenses of his living and education paid out of the proceeds of the farm and stock, and directed that, after the death of the widow, all the property thus given to her be sold, and the proceeds divided among testator's children, the executor had no right to sell the natural increase of any of the animals so bequeathed, but did have the right to sell animals received by the widow in exchange for animals which testator left to her. Leonard v. Owen, 20 S. E. Rep. 65, 93 Ga. 678. Where it appears that testator intended to give a power of sale, the language used by him, though inapt, will be construed liberally in furtherance of the attempt. Lesser v. Lesser (Super. N. Y.), 32 N. Y. S. 167. Where a will gives testator's wife all his property, directs that she pay his debts, that she raise his children, and that after

her death his estate should be divided among them, and provides that if it should be necessary, on account of existing debts, or debts that might afterwards accrue in maintaining the family, she should be privileged to sell a portion of his land, one to whom she deeds such land is not bound to show that such debts had accrued as made it necessary to sell the property, but in the absence of fraud or bad faith the question of necessity will not be investigated. Doran v. Piper, 30 Atl. Rep. 306, 164 Pa. St. 430. Testator, after giving a pecuniary legacy, directed the balance of the estate to be divided equally among his children, and gave the executor the full power to sell said estate to his best knowledge. The pecuniary legacy absorbed all the personal property. Held, that a general power in trust to sell the real estate was given to the executor. Strube v. Leutzbach (City Ct. Brook.), 33 N. Y. S. 264. Under a will which gives and bequeaths to the wife of the testator "all the property, money, and effects" belonging to testator, "to dispose of at her own discretion, and if she see cause to sell the real estate I hereby authorize her to do so, to make, execute a deed without order of court," and providing that after the death of the wife the remaining property shall be divided between testator's daughters, the widow has power to convey the fee of testator's land. McMillan v. William Deering Co. (Ind. Sup.), 38 N. E. Rep. 398. The power given one by will to "invest or use" all the property, authorizes a sale of it by him. Testator, by the second clause of his will, appointed an executrix, and gave "unto her, in her discretion, full power and authority to manage, sell, or otherwise dispose of any or all real estate of which I may die seised, either at public or private sale, and to give good and sufficient deed or deeds for the proper conveyance of the same." Held, that the executrix was given a general power of sale. McCready v. Metropolitan Life Ins. Co. (Sup.), 32 N. Y. S. 489, 83 Hun, 526. A will giving a residuary estate for life, with remainder over, with power in the life tenant, if she should deem it advisable for the benefit of said life estate, to sell any portion of it, and appropriate the avails to her own use, confers on the life tenant the power to sell and convey an absolute title to the property. Security Co. v. Pratt, 32 Atl. Rep. 396, 65 Conn. 161. Where a testator devises all his property to his wife "during her lifetime, with full power to sell property if she sees proper," etc., and provides that, after her death, he wishes all his property, "what may have been left," to be divided among his children, the wife has power to pass the fee by a sale of the realty. Fink v. Leisman (Ky.), 38 S. W. Rep. 6. A will provided that testator's daughters, at their death, each might devise one-third of the estate given them to whom she pleased, and the other two thirds to her children, if she had any, if not, "to be distributed to my other children as she may direct." One daughter died, leaving no children surviving. Held, that she could not, under the power in the will, so dispose of the two-thirds among the children of the testator as to disinherit any one of them. Clay v. Smallwood (Ky.), 38 S. W. Rep. 7. Testator, after devising a life estate in his lands to his wife, gave the lands to his son, D, providing that his other children should have an equal part out of the proceeds of the lands. Held, that D took the legal title to the lands with power to sell, and to convey, as against the other children, a good title to a purchaser for value. Bailey v. Fisher (Ky.), 38 S. W. Rep. 140. Testatrix devised to her son in trust a certain farm, to be held for seven years, for the use of her children, providing, however, that the farm might be sold at any time within such period if a majority of the children should elect. Held, that the executor had no power of sale over such real estate at the request of a majority of the children, but they alone could exercise control over the transfer of the title. Porterfield v. Porterfield (Md.), 37 Atl. Rep. 358.

## JETSAM AND FLOTSAM.

### DISSENTING OPINIONS.

"Nothing of any benefit to the public can be gained by a dissenting opinion," said Henry Wollman in an address before the Greenwood Club at Kansas City. He says: "Dissenting opinions of judges can have but one purpose, and that is to give a judge an opportunity of exhibiting his individual views and opinions." Also that "the public cares little about his individual views," but is concerned only with the decision of the court, as a court, so that people may know what it is and how to govern themselves. "The result of a dissenting opinion," he says, "is simply to open up for future discussions, litigations, and bickering the question which should then be finally settled by that tribunal." "The idea that injustice has been done by the courts," he also declares to be impressed upon people if the opinion is well written, so that the court is thereby weakened in popular esteem.

These reasons are certainly not without force. Yet the effect of dissenting opinions to weaken the courts in popular esteem may be easily overestimated. The chief question is whether the instability resulting from a dissenting opinion which causes a subsequent change of decision is not more than compensated by preventing wrong decisions from being permanently established as law.

But the most important reason given by Mr. Wollman for abolishing dissenting opinions is that the main opinion would then come to be shorter and more concise, "for all the judges, being to some extent responsible for it, would see that it was not filled with obscure illustrations and beclouded with alleged reasons of doubtful logical force." Mere *per curiam* opinions limited to what is actually decided in the case by a majority of the court would do much to relieve the legal profession from the immense burden of the vast increase of reported cases.—*Case and Comment.*

## BOOKS RECEIVED.

The Law of Wills, for Students. By Melville Madison Bigelow, Ph. D. Harvard. Boston: Little, Brown, and Company. 1898.

## HUMORS OF THE LAW.

Mr. N, a struggling lawyer in a small town in Ohio, received a call from a farmer who wanted legal advice. Mr. N took down a much-used volume from his small bookcase and gave the required advice, for which he charged the modest sum of $3.

His client handed him a $5 bill. With a troubled look Mr. N took it. He flushed in the face as he passed his fingers nervously through his pockets, and embarrassment increased as he continued his search amongthe papers on his desk.

"Well," said he, taking down the law book again and turning over the pages, "I'll give you two more dollars' worth of advice."—*Ex.*

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.**

---



1. ADMINISTRATION — Estates — Exemption from Administration.—Decedent died intestate in a foreign State without any debts, and having no property except land in the State. The heirs agreed that no administration should be taken out, and one of their number purchased title to the whole of the property and took possession: Held, that the estate was not exempt from administration.—IN RE STRONG'S ESTATE, Cal., 51 Pac. Rep. 1078.

2. ADMINISTRATOR — Right to Realty.—The administrator cannot recover possession of real estate of which testator died possessed, where there are no debts or legacies to be paid.—VOLK v. STOWELL, Wis., 74 N. W. Rep. 118.

3. ALTERATION OF INSTRUMENTS—Effect.—The makers of notes are not relieved of liability by an alteration made by an indorsee with their consent.—SCHMELZ v. RIX, Va., 28 S. E. Rep. 890.

4. APPEAL — Brief.—A *supersedeas* brief containing no argument, no citation of authorities, and giving no reason why the judgment of the lower court should be reversed, is not a brief, within the rules of the supreme court.—CITIZENS' ST. R. CO. v. UNION TRUST CO., Ind., 49 N. E. Rep. 359.

5. ARBITRATION — Notice of Appointment.—Where two arbitrators who differ have the power to appoint a third, who shall have authority to decide between them, it is necessary to inform the parties in interest of his appointment, and give them a reasonable opportunity to produce evidence as to the matters in controversy.—COONS v. COONS, Va., 28 S. E. Rep. 885.

6. ATTACHMENT — Affidavit.—Both the assignor and the assignee for the benefit of creditors may traverse the affidavit for an attachment in an action against the former.—TEWELES v. LINS, Wis., 74 N. W. Rep. 122.

7. BILLS AND NOTES — Assignment — Liability of Assignor.—Where the assignor of a note, with knowledge of the fact that the greater part of the note is usury, conceals that fact from the assignee, the assignee may hold the assignor without suing the payee; and this is true though the assignee had previously purchased from the maker a tract of land on which the note was a lien, if he had no notice of the lien, and could not, therefore, have assumed its payment as part of the consideration for the land.—WILCOXON v. MORSE, Ky., 44 S. W. Rep. 142.

8. BILLS AND NOTES—Conditional Delivery — Parol Evidence.—Where defendants pleaded that their agent delivered the note in suit contrary to instructions not to do so until H signed it, and there was evidence that they thereafter ratified his act, with knowledge that H had not signed it, the court was justified in setting aside a verdict for defendants because of its refusal to charge that, if there was such a ratification, plaintiff could recover.—HURT v. FORD, Mo., 44 S. W. Rep. 228.

9. CARRIERS OF PASSENGERS—Drover's Pass.—A shipper of stock given a pass to accompany the same is a passenger, entitled to recover of the carrier for injury through negligence of employees, notwithstanding stipulation in contract that he feed and water his stock, and during the passage be deemed an employee of the company, and assume all risks incident to his employment.—ST. LOUIS S. W. RY. CO. v. NELSON, Tex., 44 S. W. Rep. 179.

10. CARRIERS OF PASSENGERS — Negligence—Starting of Train.—A train may be started without waiting for a passenger to be seated, unless their is some special reason to the contrary. And the mere fact that a passenger is a fleshy woman, incumbered with a number of children, does not, when she has an escort with her, constitute such an infirmity as to take the case out of the general rule, so as to render the carrier liable for an injury to the passenger, caused by the sudden starting of the train before she was seated.—LOUISVILLE & N. R. CO. v. HALE, Ky., 44 S. W. Rep. 213.

11. CHATTEL MORTGAGE—Notice to Purchaser.—A mortgagee of lumber, who takes possession by merely walking around the pile in the mortgagor's lumber yard when it is formally delivered to him, has no such possession as to obviate the necessity of other notice to one purchasing from the mortgagor.—BANK OF BLACK ROCK v. DECKER, Ark., 44 S. W. Rep. 220.

12. CHATTEL MORTGAGES—Unrecorded Mortgage.—An unrecorded mortgage cannot affect a purchaser for value who has acquired title without notice of its existence.—WELSH v. NATIONAL CASH REGISTER CO., Ky., 44 S. W. Rep. 124.

13. CONSTITUTIONAL LAW—Validity of Statute—Arrest of Judgment.—The constitutionality of an act of the general assembly fixing the time for holding one of the terms of the circuit court cannot be questioned after verdict, in an action at law pending therein, by a motion in arrest of judgment.—BROWNING v. POWERS, Mo., 44 S. W. Rep. 224.

14. CONTRACT—Beneficial Interest of Third Party.—A contract made between defendant and an employee, to furnish the employee "with medical attendance" in case of accident, is not binding on defendant, so as to enable a physician to recover for professional services rendered the employee at his request when injured.—THOMAS MFG. CO. v. PRATHER, Ark., 44 S. W. Rep. 218.

15. CONTRACT — Construction.—Where it is not contended that the rights of the parties depend on anything but the construction of a contract, the question at issue is for the court.—NEALE v. DEMPSTER, Penn., 39 Atl. Rep. 289.

16. CONTRACTS—Liquidated Damages.—A department store purchasing $46,000 worth of goods of a rival store, which retained other kinds of goods worth $350,000, and contracting to pay $5,000 as liquidated damages if it advertised that its purchase included any goods other than those actually bought of its rival, is liable for more than nominal damages for a breach of such contract.—MAY v. CRAWFORD, Mo., 44 S. W. Rep. 260.

17. CONTRACTS—Public Policy—Officers.—A contract whereby an officer agrees to accept a different compensation than that provided by statute for his official acts, or whereby he agrees not to avail himself of the statutory method of enforcing collection of his fees, is contrary to public policy, and void.—PETERS v. CITY OF DAVENPORT, Iowa, 74 N. W. Rep. 6.

18. CONTRACT OF SALE — Exercise of Option.—The plaintiff, a corporation, delivered goods to R under a contract by the terms of which R agreed to sell the goods on account of plaintiff, and at its option execute to it his promissory note for its accommodation for the total amount of the list price of the goods, and at his option purchase all goods remaining on hand at a certain time thereafter: Held, by demanding after such time the payment of the notes given pursuant to the contract, plaintiff exercised the option last above mentioned, and R thereby became the owner of all the goods remaining on hand.—FAVORITE CARRIAGE CO. v. WALSH, Minn., 74 N. W. Rep. 137.

19. CONVERSION — Measure of Damages.—In actions for the conversion of personal property, where no special circumstances require a different rule, the measure of damages is the fair market value of the property at the place and time of the conversion.—GENSBURG v. FIELD, Iowa, 74 N. W. Rep. 3.

20. CORPORATIONS—Action by President—Estoppel.—In an action to recover a balance due for services as president of a corporation, plaintiff is not estopped by his knowledge of entries in the corporation's books showing the expense account charged with a less amount each month as his salary than he claims, when he testifies to an agreement with the principal stockholder to draw a less amount than his full salary on account of the financial condition of the corporation.—BUSHNELL v. SIMPSON, Cal., 51 Pac. Rep. 1080.

21. CORPORATIONS—Acts of Officers—Fraud of Buyers.—A sale of goods to an insolvent corporation cannot be rescinded by the seller on the ground of fraud, in the absence of false representations, unless the officers of the corporation, at the time of the purchase, had no reasonable expectation of making payment at the maturity of the bill.—EDELHOFF v. HORNER MILLER STRAW-GOODS MFG. CO. OF BALTIMORE CITY, Md., 39 Atl. Rep. 314.

22. CORPORATIONS—Contracts with Officers.—A contract of an officer of a railway corporation, with the company, to furnish material is not *per se* immoral, and is only void where statutes and decisions declare it against public policy; and the subsequent ratification of such a contract by a special act of the legislature makes it valid.—DANVILLE, H. & W. R. CO. v. KASE, Penn., 39 Atl. Rep. 301.

23. CORPORATIONS—Foreign Corporations—Service of Process.—In an action against a foreign corporation not engaged in business within the State, a summons will be quashed, where it was served on the president of such corporation, who was only casually and temporarily within the State, and afterwards departed therefrom, and the purpose for which he came into the State, and the capacity in which he was acting, are immaterial.—CARSTENS & EARLES v. LEIDIGH & H. LUMBER CO., Wash., 51 Pac. Rep. 1051.

24. CORPORATIONS—Promissory Notes—Interest.—Interest is not recoverable on a note given to pay for corporate stock where the note does not provide for interest, and there was no agreement to pay it, and there has been no call for payment of the subscription.—SEATTLE TRUST CO. v. PITNER, Wash., 51 Pac. Rep. 1048.

25. CORPORATIONS—Subscription to Stock—Tender.—A certain agreement held to be a subscription to stock, not a sale of stock; that it was not necessary to tender the stock before bringing suit; and that it was sufficient to allege that the corporation was ready and willing to deliver the stock.—SEYMOUR v. JEFFERSON, Minn., 74 N. W. Rep. 149.

26. CREDITORS' BILL — Parties. — After a judgment creditor has filed a bill, for the benefit of himself alone, to set aside a fraudulent conveyance, and establish the lien of the judgment, other judgment creditors are not entitled to join as parties complainant, against the protest of defendants, though complainant consents.—IAUCH v. DE SOCARRAS, N. J., 39 Atl. Rep. 881.

27. CRIMINAL EVIDENCE.—In a prosecution for larceny, the admission of testimony of witnesses as to what the complaining witness told them about defendant's taking the money, not made in presence of defendant, is clearly erroneous.—STATE v. JUDD, Mont., 51 Pac. Rep. 1033.

28. CRIMINAL LAW—Appeals by State—When Lie.—Under Rev. St. 1889, §§ 4289, 4290, allowing the State to appeal in criminal cases only where the indictment is quashed, or adjudged insufficient on demurrer, or where judgment thereon is arrested, the State cannot appeal from a judgment quashing an information, as an information is not an indictment technically, and, under section 6570, words having a peculiar and appropriate meaning in law must be understood according to their technical import.—STATE v. CLIPPER, Mo., 44 S. W. Rep. 264.

29. CRIMINAL LAW—Assault and Battery.—A charge as to assault and battery, in which self defense is set up, should justify defendant, if there was danger of personal injury, or it reasonably so appeared to defendant at the time; and a charge on abandonment of the difficulty by prosecutor should include the supposition of a reasonable appearance to defendant that prosecutor had not abandoned the difficulty.—BURRAGE v. STATE, Tex., 44 S. W. Rep. 169.

30. CRIMINAL LAW—Common Law Crimes—Forcible Entry.—Forcible entry is a misdemeanor, under Gen. St. § 4697, providing that "offenses recognized by the common-law, and not herein enumerated, shall be punished," etc.—EX PARTE WEBB, Nev., 51 Pac. Rep. 1027.

31. CRIMINAL LAW — Confessions — Admissibility.—A person who has been induced by confinement in a dark cell to make a confession is not bound thereby.—STATE v. MCCULLUM, Wash., 51 Pac. Rep. 1044.

32. CRIMINAL LAW — Homicide — Self Defense.—In a prosecution for murder, a charge that, even if defendant was near the place where the homicide was committed, yet the jury could not convict unless defendant fired the fatal shot, was properly refused, as not stating the law.—STATE v. STEWART, Mo., 44 S. W. Rep. 240.

33. CRIMINAL LAW—Jeopardy.—Defendant was once in jeopardy, where the information sufficiently charged the crime, a lawful jury had been impaneled and sworn, the court had jurisdiction, and his acquittal was on the merits as determined by the court on motion for his discharge after the conclusion of the State's case.—WASHINGTON'S ESTATE v. HUBBELL, Wash., 51 Pac. Rep. 1039.

34. CRIMINAL LAW — Judgment.—Where verdict assesses punishment of defendant, a female, at confinement in the State reformatory, though the law excludes females therefrom, a judgment providing for her confinement in the penitentiary is valid.—EX PARTE MATTHEWS, Tex., 44 S. W. Rep. 153.

35. CRIMINAL LAW—Rape.—Conviction of rape cannot stand, though prosecutrix declares that she was raped; her acts, as detailed by her, unmistakably indicating that, at most, she did not offer the resistance which the law requires.—EDMONSON v. STATE, Tex., 44 S. W. Rep. 154.

36. CRIMINAL LAW—Sufficiency of Verdict.—Where an indictment charged defendant with burglary in the second degree and larceny, a verdict merely finding him "guilty as charged" was void for uncertainty; since Rev. St. 1889, §§ 3528, 3529, provide different punishments for "burglary" and "burglary and larceny."—STATE v. ROWE, Mo., 44 S. W. Rep. 266.

37. DEED—Reservations—Construction. — An agreement to make a deed of an acre of land, for the sole purpose of building a school house thereon, deprives the grantor and his heirs of the possession and use of the land only so far as stipulated in the deed or agreement, and only to those in whose favor the license was given.—AGNEW v. JONES, Miss., 23 South. Rep. 25.

38. DESCENT AND DISTRIBUTION — Adopted Child—Right to Inherit.—An infant was adopted by strangers. The articles of adoption provided that, if she should remain with them until her majority, she should receive $500. The articles further bestowed on her "equal rights and privileges of children born in lawful wedlock:" Held, that the first provision was not exclusive as to property rights, but that on the death of the foster parents, intestate, before the child reached her majority, she was entitled to inherit as if their own.—MARTIN v. LONG, Neb., 74 N. W. Rep. 43.

39. DESCENT AND DISTRIBUTION—Authority of Agent—Estoppel.—Where the expectant heirs of a person who is *non compos* assume, without letters of guardianship, the management of his estate, which subsequently descends to them upon his death, their acts with reference to the property will bind themselves, although it would not bind their ancestor, if he had recovered his mental capacity, or his personal representatives, if the property is required for purposes of administration, such as the payment of debts.—WHEELER v. BENTON, Minn., 74 N. W. Rep. 154.

40. DURESS—Evidence.—Where defendant demanded of a husband a mortgage on his homestead, which was in his wife's name, claiming that he was a defaulter, and threatening criminal prosecution unless he gave the mortgage, evidence of the conversation between husband and wife, when he told her of such interview, was admissible, in an action by them for possession of the mortgage, on the ground of duress.—GIDDINGS v. IOWA SAV. BANK OF RUTHVEN, Iowa, 74 N. W. Rep. 21.

41. EASEMENT BY PRESCRIPTION—Twenty Years' Adverse Use.—By 20 years of open, notorious, continuous, adverse use and enjoyment of an artificial ditch to drain water from the land of one person onto and across that of an adjoining owner, by the consent of such owner, such person acquires by prescription the right to a continuance of such use and enjoyment.—WILKINS v. NICOLAI, Wis., 74 N. W. Rep. 104.

42. EJECTMENT—Failure to Pay Betterment Judgment.—Under Sand. & H. Dig. §§ 2590, 2591, providing for betterment judgment, and that till payment thereof the court shall not cause possession to be delivered to the successful party, and that the amount shall be a lien on the lands, which may be enforced by equitable proceedings within three years of the judgment, a successful plaintiff, not having paid the betterment judgment, cannot recover possession of the premises, though the three years for enforcing the lien has lapsed.—DOUGLASS v. SHARP, Ark., 44 S. W. Rep. 221.

43. EQUITY—Reformation of Instruments—Fraud and Mistake.—A self-constituted agent falsely represented that the managing member of defendant firm had read and pronounced satisfactory a written contract of sale with plaintiff, the terms of which had previously been agreed on, and thereby induced the other member of the firm to sign it without reading the contents. The contract assigned did not express the actual agreement, as it contained a clause of which defendants were ignorant. It was not shown that plaintiff authorized the agent to insert the clause, or to make the false representations: Held, that the negligence of defendants in signing the contract was not so gross as to bar them of the right of reformation of the contract on the ground of fraud and mistake.—SUTTON v. RISSER, Iowa, 74 N. W. Rep. 28.

44. EVIDENCE—Declarations.—A declaration, to be a part of the *res gestæ*, need not necessarily be coincident in point of time with the main fact proved; but such fact and the declaration concerning the same must be so clearly and closely connected that the declaration, in the ordinary course of affairs, can be regarded as the spontaneous explanation of the fact.—CITY OF FRIEND v. BURLEIGH, Neb., 74 N. W. Rep. 50.

45. EVIDENCE—Novation.—A lessor of an opera house agreed to pay the lessee $20 and a balance owing by the lessee for chairs placed in said house, and the lessee agreed to surrender the lease. They went together to the creditor, and stated the agreement; and the latter accepted the lessor as its debtor: Held, that there was a complete novation, so that the statute of frauds did not apply.—HYATT v. BONHAM, Ind., 49 N. E. Rep. 361.

46. EVIDENCE — Written Instruments.—In order to render written instruments admissible in evidence, their execution or genuineness, unless admitted, must be established by proof, except in cases within statutory exceptions.—SLOAN v. FIST, Neb., 74 N. W. Rep. 45.

47. EXECUTION SALES — Rents—Assignment—Receivers.—The appointment of a receiver to collect the debts due a judgment debtor does not preclude a purchaser under execution sale from suing the lessee of the debtor for the rents of the property purchased, as allowed by Code Proc. § 519, since a judgment in such action would simply establish a claim which the receiver would pay.—GRIFFITH v. BURLINGAME, Wash., 51 Pac. Rep. 1059.

48. EXECUTION SALES—Reversal of Judgment.—The vendee of one whose title is based on a sheriff's certificate of sale under execution, no deed having been issued, does not possess the legal title, and is not entitled to protection, as against the judgment debtor, after the judgment has been reversed.—SINGLY v. WARREN, Wash., 51 Pac. Rep. 1066.

49. FRAUDS, STATUTE OF—Easements—Reservation.—W conveyed land to K, reserving a passway for the benefit of B, pursuant to a parol agreement therefor. Soon thereafter B executed a deed to W, relinquishing a certain other right of way in consideration of the passway thus reserved; and there was an actual opening and dedication of the reserved passway, and an actual user thereof by B for some eight years: Held, that though the reservation, by reason of the fact that it was to a stranger to the deed, may not have been effective, yet as the subsequent conveyance by B to W, of which K had notice, must be regarded as a part of the same transaction, it was such a part performance of the parol contract for a right of way as to take it out of the statute of frauds.—BEINLEIN v. JOHNS, Ky., 44 S. W. Rep. 128.

50. FRAUDS, STATUTE OF—Sale of Personalty.—To take an oral contract for the sale of personal property of over $50 in value out of the statute of frauds, when no part of the purchase money has been paid, delivery and acceptance of the property, or some portion thereof, by the vendee, is necessary.—WYLER v. ROTHSCHILD, Neb., 74 N. W. Rep. 41.

51. FRAUDULENT CONVEYANCES.—Where defendant conveyed all his property to his wife for a nominal consideration, two months after an action had been instituted against him to recover actual damages for personal injuries, but before final judgment thereon, the transfer was fraudulent.—THORP v. LEIBRECHT, N. J., 39 Atl. Rep. 361.

52. FRAUDULENT CONVEYANCES—Trust Settlements.—In a suit to set aside a conveyance of real estate as in fraud of creditors, the fact that, though the debt sued

on was an honest one, complainant had not expended money or altered his situation on the strength of defendant having any ownership in the property, is not of itself sufficient to defeat complainant's right to relief.—IAUCH v. DE SOCARRAS, N. J., 39 Atl. Rep. 370.

53. GARNISHMENT—Conflict of Laws.—Where a debtor was sued in one State by his creditor, and later was garnished in another State, and the creditor obtained a judgment in the one State, which the debtor was compelled to satisfy after issuance of execution thereon, and said payment was pleaded as a bar to any further proceedings in the garnishment suit, said suit should have been dismissed.—VIRGINIA FIRE & MARINE INS. CO. v. NEW YORK CAROUSAL MFG. CO., Va., 28 S. E. Rep. 888.

54. GARNISHMENT—Debt not Due.—Under Rev. St. 1895, arts. 188, 189, providing that no attachment shall issue until a suit for the debt shall have been instituted, and authorizing suit before such debt falls due, though no judgment could be taken until its maturity, and article 217, providing for writs of garnishment in such attachment proceedings, garnishment proceedings under an attachment in an action on a note before the maturity thereof were not void.—TAYLOR v. FRYAR, Tex., 44 S. W. Rep. 183.

55. HIGHWAYS—Ownership of Fee—Telegraphs.—One who owns a fee in land, subject to the easement of the public to use it for a public highway, may maintain ejectment against a telegraph company erecting poles on the land.—POSTAL TEL. CABLE CO. v. EATON, Ill., 49 N. E. Rep. 365.

56. HOMESTEAD — Exemption — Transfer to Wife.—Land, constituting a statutory homestead, when conveyed by a husband to his wife does not become liable for his then existing debts, by subsequently losing its homestead character, even when the transfer was voluntary.—BANK OF BLADEN v. DAVID, Neb., 74 N. W. Rep. 42.

57. HUSBAND AND WIFE - Support of Minor Children.—A divorced wife may maintain an action against her former husband for maintenance of a minor child whose custody was awarded to her in the action for divorce; especially where neither of the parties had any property when the divorce was granted.—GIBSON v. GIBSON, Wash., 51 Pac. Rep. 1041.

58. INJUNCTION—Payment of Debt.—A court of equity has no power to grant an injunction enjoining an insolvent defendant, who is indebted to plaintiff, from disposing of a particular fund, where plaintiff has no lien by judgment or otherwise.—FREDERICK COUNTY NAT. BANK v. SHAFER, Md., 39 Atl. Rep. 320.

59. INJUNCTION—Subjects of Protection—Levy of Execution.—Where no execution on a judgment for witness fees has been issued to the county in which the judgment was rendered, as required by Rev. St. 1895, art. 2335, and returned *nulla bona*, levy of an execution issued on such judgment to another county will be restrained by injunction.—NORWOOD v. ORIENT INS. CO., Tex., 44 S. W. Rep. 188.

60. INSOLVENCY—Insolvent Traders—Deed of Trust.—A trader who, before default has been made in the payment of a draft drawn by him, makes a general assignment for the benefit of his creditors, does not cease to be a trader so as to escape the provisions of the insolvent law, providing for the insolvency of merchants and traders.—GARDNER v. GAMBRILL, Md., 39 Atl. Rep. 318.

61. INSURANCE POLICY—Construction—Under the rule that where the language of a contract is plain and unambiguous, and where words or terms in a contract may be reasonably construed in either of two ways but extrinsic evidence is not resorted to for the purpose of aiding in the construction, the proper construction of the contract is for the court. The proper construction of language in an insurance policy, to the effect that "fires caused by the use of steam engines on the premises insured, other than threshing machine engines using coal for fuel with sufficient wood to kindle or start the fire," was a question solely for the court.—THURSTON v. BURNETT & BEAVER DAM FARMERS' MUT. FIRE INS. CO., Wis., 74 N. W. Rep. 181.

62. JUDGES—Accepting Insufficient Bond—Evidence.—In an action against a county judge to recover damages for his negligence in accepting an insufficient bond, defendant cannot object to the admission, as evidence, of the record showing the approval of the bond, on the ground that the record was not signed by him as required by the statute.—FARLEY v. LEWIS, Ky., 44 S. W. Rep. 114.

63. JUDGMENT—Equitable Relief.—An action in equity to amend a judgment will not lie on the ground that it was inadvertently entered, and that such inadvertence is apparent on the face of the judgment roll, including the findings, in that it failed to decide the matters in controversy, was entered by mistake, and does not express the decision of the court.—LONG v. EISENBEIS, Wash., 51 Pac. Rep. 1061.

64. JUDGMENT—Opening Default Judgment.—The requirement of Civ. Code, § 342, that an application for a new trial shall be made "within three days after the verdict or decision is rendered, unless unavoidably prevented," does not apply to a motion to set aside a default judgment, but such motion may be made at any time during the term at which the judgment is rendered.—RIGLESBERGER v. BAILEY, Ky., 44 S. W. Rep. 118.

65. JUDGMENT—Res Judicata — Divorce.—A recital in a decree of divorce rendered by a court of another State, that the petitioner was a resident of that State for the statutory period, is conclusive in New Jersey, not only as to the period of citizenship, but as to the fact of petitioner's domicile in the other State.—MAGOWAN v. MAGOWAN, N. J., 39 Atl. Rep. 364.

66. JUDGMENT LIEN — Entry on Record Book.—Under Code, § 3769, providing that every final adjudication of the rights of parties shall be a judgment, and (section 3784) must be recorded, a judgment signed by the judge, and indorsed and filed by the clerk, is not a lien until recorded in the record book, under Code, § 3801, providing for a lien upon land owned "at the time of such rendition."—CALLANAN v. VOTRUBA, Iowa, 74 N. W. Rep. 13.

67. JUDICIAL SALES—Estoppel.—Where only the interest of K's unknown heirs was sold at a judicial sale for taxes, the purchaser of the interest of K's devisees is not estopped to assert his title by his acceptance from the sheriff of the surplus proceeds of the sale.—HARTMANN v. HORNSBY, Mo., 44 S. W. Rep. 242.

68. LANDLORD AND TENANT—Repairs.—Where the city notified a landlord that she must repair the leased property, and the tenant refused to pay rent until the repairs were made, and she agreed to pay for repairs, a finding that she authorized the tenant to have the property repaired will not be disturbed.—SHEEHAN v. WINEHILL, Wash., 51 Pac. Rep. 1065.

69. LANDLORD AND TENANT — Tenancy from Year to Year.—An entry under a lease for a term of years at an annual rent, void for any cause, and payment of rent under it, creates a tenancy from year to year upon the terms of the lease, except as to its duration.—BALTIMORE & O. R. CO. v. WEST, Ohio, 49 N. E. Rep. 344.

70. LIMITATIONS — Accrual of Causes of Action.—A complaint against a city alleged that in 1889 it negligently graded a certain street, and excavated to about 25 feet below the natural surface of plaintiff's lot, without providing any means for lateral support; that from that time to 1897 the soil near plaintiff's lot slid into said street, and was removed by defendant; that in the last of 1896, and in January, 1897, defendant oftentimes removed the soil so sliding into said street; that in October, 1896, plaintiff's lot began to fall; and so continued during the following three months, by reason of the failure of defendant to provide lateral support: Held, that the alleged cause of action did not accrue, and limitations did not begin to run, until October, 1896.—SMITH v. CITY OF SEATTLE, Wash., 51 Pac. Rep. 1057.

71. LIMITATION OF ACTIONS—Adverse Possession—Trusts.—The rule that, where the legal title to land held by a trustee is barred by limitations, the equitable interests will also be defeated, though the *cestui que trust* is an infant, applies, though the person who holds the land is a constructive trustee, by reason of having purchased from the actual trustee with knowledge of his violation of the trust; and therefore where S, who held land in trust for P's wife and children (the trust being for the benefit of the wife during her life, remainder to her children), sold and conveyed the land to K, who held the land adversely for more than 30 years, the children, though infants, are barred, without regard to the time when the life estate terminated.—WILLSON v. LOUISVILLE TRUST CO., Ky., 44 S. W. Rep. 121.

72. LIMITATION OF ACTIONS — Pendency of Legal Proceedings.—In 1882 the only heir of an intestate sued in the court in which the administration of his estate was pending, attacking the validity of the administration, and seeking to have the administrator dismissed. The litigation continued until June, 1889, when it was finally determined in favor of the administrator. In 1886 the heir conveyed land of which deceased died seised, and the grantee took possession: Held, that the limitations ran against the administrator pending such litigation, as to such land, in favor of said grantee.—BOWEN v. KIRKLAND, Tex., 44 S. W. Rep. 189.

73. MALICIOUS PROSECUTION — Want of Probable Cause.—The acquittal of a defendant upon a trial of a criminal charge is not *prima facie* evidence of the want of probable cause for the prosecution.—EASTMAN v. MONNASTES, Oreg., 51 Pac. Rep. 1095.

74. MANDAMUS — Towns — Change of Street Grade.—Though an abutter have a right to the restoration of a street grade, it is not the duty of the surveyor of highways to restore it, or to work it to a grade established of record, as he is merely a ministerial officer of the town council, and has no authority to incur any indebtedness, except, perhaps, in case of emergency.—SWEET v. CONLEY, R. I., 39 Atl. Rep. 326.

75. MARRIED WOMEN — Power to Contract.—When a married woman signs a note, there is no presumption that she intended thereby to fasten a liability upon her separate estate, but in an action on such note, where coverture is pleaded as a defense, and proved, the burden is upon the plaintiff to establish that it was made with reference to, and upon the credit of, her property, and with the intent to bind the same.—GRAND ISLAND BANKING CO. v. WRIGHT, Neb., 74 N. W. Rep. 82.

76. MASTER AND SERVANT—Defective Appliances—Assumption of Risks.—A servant is not ordinarily obliged to search for defects in instrumentalities furnished for his use; nevertheless, in the use of ordinary tools, he takes the risk of all defects therein which are open and obvious to a person of ordinary care, by reasonable attention to them as they are used.—BORDEN v. DAISY ROLLER MILL CO., Wis., 74 N. W. Rep. 91.

77. MASTER AND SERVANT—Fellow-servant.—A superintendent in charge of the work of moving and erecting a telephone pole, the moving to be done by having one end placed on a carriage, is a fellow servant of the workmen in directing them to "let go" before the carriage has been backed far enough under the pole.—MORGRIDGE v. PROVIDENCE TEL. CO., R. I., 39 Atl. Rep. 328.

78. MASTER AND SERVANT — Negligence — Places for Work.—Where an employer furnishes a place for his employees to work as safe as other persons of ordinary care, engaged in like business and in like circumstances, ordinarily furnish, he is not liable to an employee who is injured, as alleged, because he was furnished an unsafe place in which to work.—PRYBISKI v. NORTHWESTERN COAL RY. CO., Wis., 74 N. W. Rep. 117.

79. MECHANICS' LIENS — Property Subject.—Under Code, art. 63, § 22, providing that machines are subject to a lien in like manner as buildings, a lien cannot be claimed on a steam heating apparatus consisting of a boiler and furnace, built in brick and cement, with pipes and radiators throughout the building, as such apparatus is a fixture.—STEBBINS v. CULBRETH, Md., 39 Atl. Rep. 321.

80. MORTGAGES—Assumption by Grantee.—A person, not having a fraudulent or criminal purpose in so doing, may enter into a contract by any name he may choose to assume. All that the law looks to is the identity of the individual, and, when that is ascertained and clearly established, the act will be binding upon him and upon others.—SCANLON v. ALEXANDER, Minn., 74 N. W. Rep. 146.

81. MORTGAGE—Foreclosure—Decree.—A recital in a decree of foreclosure that defendant appeared by attorney, who was her husband, is conclusive as to such appearance, where the only evidence to show the recital erroneous is testimony by the husband, who was also a party, that she did not appear or answer, and that he knew she did not, because she told him so, and he filed the answer himself, where it is not alleged that he had not authority to do so.—WILENBURG v. HERSEY, Iowa, 74 N. W. Rep. 1.

82. MORTGAGE—Foreclosure Sale.—A purchaser at a foreclosure sale acquires the mortgagee's interest under tax certificates, under Rev. St. § 3169, making such sale a bar to all claims against the parties to the action.—AMES v. STORER, Wis., 74 N. W. Rep. 101.

83. MORTGAGES—Priority.—Where the vendee of land, on the day on which it was conveyed to her, executed a mortgage thereon to a loan company for a part of the price, and also a mortgage to her vendor for the balance, and such deed and both mortgages were filed for record on the same day—first, the mortgage to the loan company; next, the deed to the mortgagor; and, last, the mortgage to her vendor—such mortgage to the loan company was entitled to priority, in the absence of notice otherwise, over that to the vendor, the holder of which was chargeable with all the knowledge that the record imparted.—HIGGINS v. DENNIS, Iowa, 74 N. W. Rep. 9.

84. MUNICIPAL CORPORATIONS — Contracts.—A taxpayer may resort to equity to restrain a municipal corporation and its officers from appropriating money raised by taxation to unauthorized uses.—BLOOD v. MANCHESTER ELECTRIC LIGHT CO., N. H., 39 Atl. Rep. 335.

85. MUNICIPAL CORPORATIONS—Defective Sidewalks.—A portion of an inclined sidewalk in defendant village had ice and snow thereon to such depth that the cleats thereon were covered. In the morning, while going down the incline, plaintiff slipped and fell. She had passed over the sidewalk in the opposite direction about an hour previous, and observed that it was very slippery. The walk was not slippery prior to the previous night, but became so during the night, by reason of a mist, followed by a slight flurry of snow: Held, that the plaintiff could not recover for her injuries.—COOPER v. VILLAGE OF WATERLOO, Wis., 74 N. W. Rep. 115.

86. MUNICIPAL CORPORATIONS—Dedication—Extent.—Where land is surveyed and platted into an addition to a city, in pursuance of the statute, the fee-simple title to the streets and alleys of such addition thereby vests in the public.—JAYNES v. OMAHA ST. RY. CO., Neb., 74 N. W. Rep. 67.

87. MUNICIPAL CORPORATIONS — Defective Streets—Negligence.—In an action by plaintiff to recover for injuries caused by defects in a sidewalk along a street, where the grade had been raised, and sidewalks made to correspond to the grade, where plaintiff knew of the change of grade, but did not know of the condition of the sidewalk at the place in which he was injured when using it, on a dark night, the question of negligence was for the jury.—BAUERLE v. CITY OF PHILADELPHIA, Penn., 39 Atl. Rep. 298.

88. MUNICIPAL CORPORATIONS—Proceedings to Authorize Issuance and Sale of Bonds.—The purchase of waterworks, and the erection of new ones, are distinct

measures, requiring different proceedings; and a resolution of council which combines both as one, and provides for the submission, in that form, of the question of the issue and sale of the bonds of the municipality for both purposes combined, is unauthorized, and ineffectual for either purpose; nor can it be made effectual for either, by the elimination of the other in the proceedings subsequent to the resolution. It is the policy of the statute that each measure for which it is proposed to issue and sell the bonds of the corporation shall stand on its own merits, unaided by combination with others, and that it be voted upon as an independent measure, by the council and electors, uninfluenced by such combination.—ELYRIA GAS & WATER CO. v. CITY OF ELYRIA, Ohio, 49 N. E. Rep. 335.

89. MUNICIPAL CORPORATIONS—Special Taxes.—Judgments for special taxes are *in rem*, and can only operate against the particular lot or tract of land against which the taxes were assessed; hence a single judgment for the sum of the assessments against two or more separate parcels is an attempt to subject each lot to the payment of the taxes on both, and is void.—HOOVER v. PEABODY, Ill., 49 N. E. Rep. 367.

90. MUNICIPAL CORPORATIONS—Street Lighting Franchises.—It is within the power of cities of the first class, having less than 25,000 inhabitants, to grant the right to a gas company to lay and maintain its pipes and mains under the streets and other highways of the city for the purpose of supplying its inhabitants with gas, and to regulate the charge therefor.—SHARP v. CITY OF SOUTH OMAHA, Neb., 74 N. W. Rep. 76.

91. MUNICIPAL INDEBTEDNESS — Bonds — Validity.—Under the amendment to St. 1889, p. 401, § 6, relating to the issuance of municipal bonds for improvements, by St. 1893, p. 61, providing "all municipal bonds for public improvements shall be payable in gold coin or lawful money of the United States," etc., the trustees of a city may, at their option, make the bonds payable in either gold coin of the United States or lawful money of the United States.—MURPHY v. CITY OF SAN LUIS OBISPO, Cal., 51 Pac. Rep. 1085.

92. NEGLIGENCE—Dangerous Premises—Mental Capacity.—Where a person being lawfully on another's premises is injured by dangerous machinery thereon, the liability of the owner thereof is determined, not by the insufficient experience, but by the insufficient capacity of the injured party to appreciate the danger.—SAN ANTONIO WATERWORKS CO. v. WHITE, Tex., 44 S. W. Rep. 181.

93. PARTNERSHIP — Appointment of Receiver—Nonconsent of Partner.—The appointment of a receiver in an action between partners, though appearing to have been made by consent, does not estop the defendant from taking issue on the allegations of the petition which relate to the rights of the parties or of creditors in the partnership property, nor from attacking the validity of mortgages made by the plaintiff of the partnership property without the defendant's consent; but the existence and membership of the firm, as alleged in the petition, is not thereafter open to dispute by the parties.—MCGRATH v. COWEN, Ohio, 49 N. E. Rep. 388.

94. PAYMENT—Fraud—Ignorance of Law.—For a public officer, whose fees, by law, are to be paid by the city, and are paid by the city, to receive fees to which he knows he is not entitled, and which he knows are being paid to him by a party ignorant of the law, who would not pay if he knew the law, and not to inform him that he was not bound to pay, is fraudulent; and such officer should restore the money, which he cannot conscientiously retain.—MARCOTTE v. ALLEN, Me., 39 Atl. Rep. 346.

95. PLEADING—Defects Cured by Verdict.—Rev. St. 1894, § 670 (Rev. St. 1881, § 658), under which amendments for any defect of form are, after verdict, deemed to have been made, does not apply to a complaint which is deficient in matters of substance.—SHEFFER v. HINES, Ind., 49 N. E. Rep. 348.

96. PLEDGE—Certificate of Stock.—A power of attorney on the back of a certificate of stock containing a full power of sale, authorizing sale by any attorney having it in his lawful possession, being executed by a pledge of the certificate, gives the innocent pledgee a good claim thereto against the owner.—GILBERT v. ERIE BLDG. ASSN., Penn., 39 Atl. Rep. 291.

97. PRINCIPAL AND AGENT—Authority of Agent.—The plaintiff, being the owner of a note secured by a real estate mortgage containing a power of sale, detached from the note an interest coupon, and transmitted it to an agent for collection (that being the extent of his express authority), the plaintiff herself retaining the principal note, not yet due, and the mortgage: Held, that the agent had no implied authority to foreclose the mortgage under the power; that in such case his implied authority was limited to a resort to such remedies as might be pursued for the collection of the coupon, irrespective of the collateral mortgage.—BURCHARD v. HULL, Minn., 74 N. W. Rep. 163.

98. QUIETING TITLE.—Allegations to the effect that the property was levied upon and sold on an execution issued on a judgment against a stranger to the title, that certificates of sale in due form of law were issued, delivered and filed, pursuant to such sale, according to the statutes in such cases, and that such certificates are still outstanding and of record, sufficiently show the hostile claim of title, and satisfy the requirement of the statute.—BRODERICK v. CARY, Wis., 74 N. W. Rep. 95.

99. QUIETING TITLE—House on Land of Another.—The defendant, without the knowledge of the owners of a lot, and without license, express or implied, from them, but by mistake, supposing it to be his own, erected a house thereon. Such mistake was the result of his own negligence, and the fault of no one else: Held, that the house became a part of the lot, and the defendant is not entitled either to remove the house, or enforce a lien against the lot for the value of the house.—MITCHELL v. BRIDGEMAN, Minn., 74 N. W. Rep. 142.

100. QUIETING TITLE—Pleading—Demurrer.—Where the complaint, in an action to quiet title, was insufficient on demurrer, in that it failed to show title in plaintiff, such omission was not supplied by a supplemental complaint, on bringing in his grantee as a coplaintiff, which also failed to show that such original plaintiff had any title or interest in the land in controversy.—CHAPMAN v. JONES, Ind., 49 N. E. Rep. 347.

101. REPLEVIN—Sufficiency of Complaint.—A complaint in replevin stated that plaintiff was the owner and entitled to possession of a note for $274.25; that defendant unlawfully detained possession of it; that said note had been discharged by plaintiff by giving defendant another note for $299, "in lieu of and in place of and to discharge the said note of $274 25 and interest in full on the same, which said note the said defendant also holds:" Held bad, in that it did not allege that defendant agreed to accept the last note as payment of the first, or that a demand had been made.—COMBS v. BAYS, Ind., 49 N. E. Rep. 358.

102. RES JUDICATA—Parties.—A judgment, in an action by F against an association, determining that F was the owner of certain shares therein, is not conclusive between the association and H, though H was notified of the action, and testified therein for the association; he not having been allowed to defend therein, and the right to appeal having been stipulated away by the association.—FIFTH MUT. BLDG. SOC. OF MANAYUNK v. HOLT, Penn., 39 Atl. Rep. 293.

103. SALES—Damages.—In an action for breach of a contract of sale of cotton to be delivered by defendant to plaintiff at W, it was error to admit evidence of the prices at which persons in several different States offered to sell plaintiff cotton delivered at W, in the absence of evidence that cotton had no market value at W, that there was none there for sale, and that there was no market near W where cotton had a market value.—STEINLEIN v. S. BLAISDELL, JR., Co., Tex., 44 S. W. Rep. 200.

104. SALES—Delivery—Place.—Delivery to the carrier designated by the consignee is a delivery to the consignee, subject to the vendor's lien.—STATE v. PETERS, Me., 39 Atl. Rep. 342.

105. SALE—What Constitutes—Agency. — A contract under which a manufacturing company appoints a merchant its agent to sell tobacco, with the title to remain with it until sold, and agrees to pay a commission, reserving the right not to pay it if the tobacco is sold for less than the price fixed by it, and in which the merchant warrants that every shipment shall be paid for in full, is one of sale, and not of agency.—WILLIAMS v. DRUMMOND TOBACCO CO., Tex., 44 S. W. Rep. 185.

106. SALE BY SAMPLE AND DESCRIPTION—Warranty.—Where goods are sold, not only by sample, but by description as well, with a warranty that they shall correspond with both the description and sample, it is not sufficient that the bulk of the goods correspond with the sample, if the goods do not also correspond with the description; and the vendee may retain the goods, and rely upon his warranty as to description.—MIAMISBURG TWINE & CORDAGE CO. v. WOHLHUNTER, Minn., 74 N. W. Rep. 175.

107. SPECIFIC PERFORMANCE—Assumption of Mortgage Debt.—A verbal agreement by the grantee to assume a mortgage debt on property conveyed is independent of the deed, and may be enforced.—ORDWAY v. DOWNEY, Wash., 51 Pac. Rep. 1047.

108. SUBROGATION—When Allowed.—"The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice, and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case."—AULTMAN, MILLER & CO. v. BISHOP, Neb., 74 N. W. Rep. 55.

109. TAXATION—Assessment of Personal Property.—Though Code, § 1356, provides that a person assessed for taxation shall be informed in writing of the valuation placed on his property, and that he may appear before the board of review if aggrieved thereby, the omission of such notice will not invalidate the assessment, which will be presumed to have been properly made.—IN RE KAUFFMAN'S ESTATE, Iowa, 74 N. W. Rep. 8.

110. TAX CERTIFICATE—Evidence of Assignment.—An offer and reception in evidence of a certificate of purchase at tax sale, if it have an indorsement of an assignment thereon, does not include and carry with it, as evidence, such assignment, unless the offer and reception were sufficiently broad to, and did, include such indorsement.—JOHNSON v. ENGLISH, Neb., 74 N. W. Rep. 47.

111. TAX SALE—Notice to Redeem.—It is the settled rule in this State that a purchaser at a tax sale is not required to give the notice to redeem mentioned in section 3 of article 9 of the constitution, in order to maintain an action to enforce a tax lien.—VAN ETTEN v. MEDLAND, Neb., 74 N. W. Rep. 83.

112. TORTS—Contribution between Joint Wrongdoers.—One who has been convicted and compelled to pay a fine under an indictment charging him with the offense of "unlawfully, willfully and feloniously" cutting and carrying away timber from the land of another, cannot compel contribution from one from whose land he had undertaken to cut timber, and who pointed out as a part of his boundary the land in question, as there can be no contribution between joint wrongdoers, where the person who seeks to compel contribution knew, or must be presumed to have known, that the act was unlawful.—SUTTON v. MORRIS, Ky., 44 S. W. Rep. 127.

113. TRESPASS TO REALTY—Tenants by Entireties.—A husband may recover alone damages to a storeroom of which he had possession, caused by an explosion, though the premises were owned by him and his wife as tenants by entireties.—SHERIDAN GAS, OIL & COAL CO. v. PEARSON, Ind., 49 N. E. Rep. 357.

114. TRIAL—Jurors—Competency.—Where a juror had formed and expressed an opinion as to the guilt of accused, derived solely from rumor and newspapers, but stated that, nevertheless, he believed he could render an impartial verdict, though he had expressed the opposite belief on the examination by counsel for defendant, and there was nothing to show any feeling against defendant or his cause, a challenge for cause was properly overruled.—SHIELDS v. STATE, Ind., 49 N. E. Rep. 351.

115. TRUST—Delivery.—A valid trust may be created by executing and delivering an assignment of an equitable interest to a trustee.—TARBOX v. GRANT, N. J., 39 Atl. Rep. 378.

116. TRUST—Resignation of Trustee.—Under a power given to a wife to appoint and choose by her writing, under her seal, another trustee instead of the one named in a trust deed executed by her husband conveying real and personal property in trust for the wife and her children, whenever the named trustee should wish to resign his trust, or should die leaving the same unfulfilled, the wife has authority to appoint her husband to be such trustee upon the resignation of the one named. The husband's acceptance of such appointment binds him to execute the trust according to its terms, and he thereby becomes invested with the same powers, and is subject to the same responsibilities, as other trustees; and the wife is entitled to the same protection against him in equity as any other *cestui que trust*.—STEARNS v. FRALEIGH, Fla., 23 South. Rep. 18.

117. WILLS—Nature of Estate—Deed.—A clause in a will which provides that land shall be purchased for the benefit "of M during his life, and at his death to be the property of any child surviving him, and, in case he dies without children, then to be divided among" testator's children and certain grandchildren, creates only a life estate in M.—MORRIS v. EDDINS, Tex., 44 S. W. Rep. 203.

118. WILLS—Nature of Estate Devised.—A devise to testator's son of a house and lot; "also, the use of the adjoining lot, to be used and enjoyed by him during the term of his natural life; and, from and immediately after his death I give, bequeath and devise the same to grandchildren"—passes a purely legal estate, as to both lots.—HAYDAY v. HAYDAY, N. J., 39 Atl. Rep. 373.

119. WILLS—Power of Trustee to Sell.—Under a will devising the share of testator's daughter in his estate to her brother, "to rent, sell, put at interest and to receive and manage her interest," for the sole benefit of her and her children, the trustee had the power, the daughter uniting in the deed, to sell and convey a part of the land devised, and, as it was not the duty of the purchaser to look to the application of the purchase money, the remedy of the remainder-men, if any, is against the trustee, and not against the purchaser.—COX v. FANT, Ky., 44 S. W. Rep. 117.

120. WILLS—Rule in Shelley's Case.—In a devise of land to one, "to hold the same during the term of his natural life," and giving him the use, rents and profits of it during such time, but providing that he should "have no power to convey or dispose of the same" for a period longer than his life, and that at his death it should descend to his heirs, the word "heirs" will not be given its technical effect, and the rule in Shelley's Case will not apply, as it was testator's clear intention to create a life estate only.—WESCOTT v. BINFORD, Iowa, 74 N. W. Rep. 18.

121. WILLS—Substituted Legacy—Revocation.—A substituted or additional legacy in a will is *prima facie* payable out of the same funds, and subject to the same incidents and conditions, as is the original legacy, irrespective of whether the result is advantageous to the legatee.—IN RE DE LAVEAGA'S ESTATE, Cal., 51 Pac. Rep. 1074.